

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 17, 2008

THOMAS E. POPE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Davidson County
No. 07C3772 Amanda McClendon, Judge

No. M2008-00889-CCA-R3-HC - Filed August 6, 2009

The pro se petitioner, Thomas E. Pope, appeals as of right the Davidson County Circuit Court's summary dismissal of his petition for a writ of habeas corpus challenging his convictions for two counts of aggravated robbery and one count of carjacking. The petitioner alleges that the habeas corpus court should not have dismissed his petition for failure to pay the partial filing fee and that his judgments are void due to illegal sentences imposed in contravention to Blakely v. Washington. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Thomas E. Pope, Nashville, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; and Deshea Dulany, Assistant Attorney General, Nashville, Tennessee, attorneys for appellee, State of Tennessee.

OPINION

The petition reflects that on September 18, 1998, the Shelby County Criminal Court imposed an effective sentence of thirty years' incarceration as a result of the petitioner's nolo contendere pleas to two counts of aggravated robbery and one count of carjacking. On December 26, 2007, the petitioner filed a petition for a writ of habeas corpus alleging that his judgments were void because "the trial court was without authority to decide all the facts's [sic] of his case without a jury to decide any enhancement factors to increase his sentence beyond what the trial court had the authority to impose." On January 25, 2008, the habeas corpus court entered an order directing the payment of a partial filing fee in consideration of the petitioner's claimed indigency. On February 12, 2008, the petitioner filed an Inmate Affidavit regarding his ability to pay. On March 19, 2008, the habeas corpus court dismissed the petition without prejudice due to the petitioner's failure to submit a partial filing fee.

On appeal, the petitioner argues that the habeas corpus court should not have dismissed the petition for failure to pay the partial filing fee. He also argues that he is entitled to habeas corpus relief based upon the alleged Blakely error. The State argues that the petition should have been dismissed based upon the petitioner's failure to comply with the procedural requirements and because the petition fails to state a cognizable claim for relief. Following our review, we agree with the State.

ANALYSIS

In Tennessee, the grounds upon which habeas corpus relief may be granted are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). The writ will issue only when the petitioner has established a lack of jurisdiction for the order of confinement or that he is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery v. Avery, 432 S.W.2d 656 (Tenn. 1968); State ex rel. Wade v. Norvell, 443 S.W.2d 839 (Tenn. Crim. App. 1969). The purpose of the habeas corpus petition is to contest a void, not merely a voidable, judgment. State ex rel. Newsome v. Henderson, 424 S.W.2d 186, 189 (Tenn. 1968). A void, as opposed to a voidable, judgment is "one that is facially invalid because the court did not have the statutory authority to render such judgment." See Summers v. State, 212 S.W.3d 251, 256 (Tenn. 2007). A petitioner bears the burden of establishing a void judgment or illegal confinement by a preponderance of the evidence. See Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000). A court may summarily dismiss a petition for habeas corpus relief, without the appointment of counsel and without an evidentiary hearing, if the petition does not state a cognizable claim. See Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004).

Initially, we note that the procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. Summers, 212 S.W.3d at 260 (citations omitted). Therefore, the petitioner's failure to attach copies of the judgments under attack is a basis for summary dismissal. Likewise, the petitioner's failure to pay the partial filing fee may result in a summary dismissal. Tenn. Code Ann. § 41-21-807. However, we note that the habeas corpus court's order of dismissal makes no finding regarding the petitioner's ability to pay and merely dismisses the petition due to the petitioner's failure to pay. See Jason Eugene Mize v. State, No. M2003-00986-CCA-R3-CD, 2003 WL 22970969, at *2 (Tenn. Crim. App. Dec. 18, 2003) (A petitioner "may not be prevented from proceeding with his petition for habeas corpus relief because he is unable to pay the initial partial filing fee"). Nevertheless, for the reasons stated below, we conclude that the petition fails to state a cognizable claim for relief. Accordingly, the petition was properly dismissed.

In Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), the Supreme Court held that any fact other than that of a prior conviction used to enhance a defendant's sentence must be proven to a jury beyond a reasonable doubt. Blakely, 542 U.S. at 301, 124 S. Ct. at 2536. The petitioner's claim of an erroneously enhanced sentence is not cognizable in a habeas corpus case because the claim, even if proven, would render the judgment voidable, not void. See Ulysses Richardson v. State, No. W2006-01856-CCA-R3-PC, 2007 WL 1515162, at *3 (Tenn. Crim. App. May 24, 2007) (stating that "even a valid Blakely claim renders a conviction voidable, not void, and is thus

non-cognizable in habeas corpus review”), app. denied (Tenn. Sept. 17, 2007). Additionally, this Court has repeatedly held that Blakely and its progeny did not create a new rule of law entitled to retroactive application in the context of a collateral, habeas corpus proceeding. See, e.g., Gary Wallace v. State, No. W2007-01949-CCA-R3-CO, 2008 WL 2687698, at *2 (Tenn. Crim. App. July 2, 2008); Glen Cook v. State, No. W2006-01514-CCA-R3-PC, 2008 WL 821532, at *10 (Tenn. Crim. App. Mar. 27, 2008), app. denied (Tenn. Sept. 29, 2008); Billy Merle Meeks v. Ricky J. Bell, Warden, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486, at *7 (Tenn. Crim. App. Nov. 13, 2007), app. denied (Tenn. Apr. 7, 2008). The petitioner has stated neither a claim of a void judgment, that is, one that the trial court was without authority to enter, nor one of an expired sentence. The petition was properly dismissed.

Upon due consideration of the pleadings, the record, and the applicable law, this court concludes that the petitioner has not established that he is entitled to habeas corpus relief. The judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE